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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

EDWARDSVILLE INTELLIGENCER, INC., a Corporation,
Respondent,

vs.

LENA S. TUNNELL, Executrix of the Will of Robert W. Tunnell,
Deceased, in Substitution for Robert W. Tunnell,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois

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To the Supreme Court of Illinois

Petitioner, Lena S. Tunnell, Executrix of the Will of Robert W. Tunnell, Deceased, in substitution for Robert W. Tunnell, a natural person, now petitions the Supreme Court of the United States to issue its Writ of Certiorari to review the final judgment of the Supreme Court of Illinois in the cause entitled: "Edwardsville Intelligencer, Inc., a Corporation, Appellant v. Lena S. Tunnell, Executrix of the Will of Robert W. Tunnell, Deceased, in Substitution for Robert W. Tunnell, Appellee" (No. 41687, 252 N. E. 2d 538). Said final judgment reversed the decision of the Appellate Court of Illinois, Fifth District, in the case entitled: "Robert W. Tunnell, Plaintiff v. Edwardsville Intelligencer, Inc., a Corporation, Defendant"

(99 Ill. App. 2d 1, 241 N. E. 2d 28) which reversed the judgment of the Circuit Court of the Third Judicial Circuit of Illinois in favor of the defendant. The concluding paragraph of the Appellate Court's decision was as follows:

> "We therefore grant plaintiff's motions and deny the motion to dismiss the appeal; we reverse the judgment for the defendant and here enter judgment on the verdict in favor of the plaintiff, Lena S. Tunnell, Executor of the estate of Robert W. Tunnell, Deceased, against the defendant, Edwardsville Intelligencer, Inc., a Corporation, in the amount of $35,000.00 and costs".

REPORTS OF OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth District, was filed August 14, 1968 and is reported in 99 Ill. App. 2d 1 and in 241 N. E. 2d 28.

The opinion of the Supreme Court of Illinois was filed September 26, 1969. Petitioner filed a timely petition for rehearing which was denied by the Supreme Court of Illinois November 25, 1969 and is reported in 252 N. E. 2d 538.

The opinions of both Courts are set forth in the Appendix to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The date of the judgment of the Supreme Court of Illinois sought to be reviewed is September 26, 1969. It was entered on that day.

(ii) Petitioner sought a rehearing and her petition for rehearing was denied November 25, 1969. No extension of time has been applied for or ordered within which to seek Certiorari.

(iii) The law confirming jurisdiction on this Court to review by Writ of Certiorari is the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

This is a libel suit brought by a city attorney against a daily newspaper. It involves freedom of the press under the provisions of the First Amendment to the Constitution of the United States and on its merits the case is governed by the decisions of the Supreme Court of the United States (New York Times Co. v. Sullivan (1964), 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, Curtis Publishing Company v. Butts (1967), 18 L. Ed. 2d 1094, 1101, 1115, 388 U. S. 130, 87 S. Ct. 1975, St. Amant v. Thompson (1968), 390 U. S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323).

The Illinois Courts disagreed as to the interpretation of the above mentioned Supreme Court decisions.

The constitutional question was raised in the amended complaint filed March 4, 1965, (Abs. 4) and in the defendant's motion for summary judgment filed April 15, 1966 (Abs. 13).

Petitioner's theory throughout this entire litigation has been that the defendant published and circulated a libelous statement concerning the plaintiff, to-wit:

> **"Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained",**

and that said libelous statement was published and circulated by the defendant with actual malice, that is to say: with knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not.

This case was tried before a jury and the jury returned a verdict in favor of the plaintiff and against the defendant as follows:

"We, the jury, find in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages in the sum of $ none dollars, and punitive damages in the sum of $35,000.00".

QUESTION PRESENTED FOR REVIEW IS

1. Was the plaintiff's proof of "actual malice" on the part of defendant sufficient to meet the test enunciated in the aforementioned cases decided by the Supreme Court of the United States?

2. Was the jury properly instructed?

3. Did the Supreme Court of Illinois error in ignoring the verdict of the jury and stating that as a matter of law the evidence of actual malice did not pass the test laid down by the Supreme Court of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of bridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

(Page numbers referred to are those appearing in Appellant's Abstract in the Supreme Court)

This is a libel suit against a newspaper tried before a jury. The jury returned the following verdict:

> **"We, the jury, find in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages in the sum of $ none dollars, and punitive damages in the sum of $35,000.00 dollars".**

The facts of the case are as follows: The plaintiff, Robert W. Tunnell, a licensed attorney and city attorney of Edwardsville, Illinois, sued the Edwardsville Intelligencer, Inc., the defendant, for publishing and circulating a news article on February 23, 1961, which concluded with the following statement:

> "Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained".

Plaintiff charged the above quoted sentence was wholly false and untrue, was published and circulated with actual malice, that is to say: "with knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not", and by reason of the publication of said false and defamatory article the plaintiff was greatly injured in his reputation (Abs. 5, and Plaintiff's Exhibit A at 6-9). The case was tried May 8th, 9th, 10th and 11, 1966. The plaintiff offered the testimony of Donald M. Buckley, an attorney who had known the plaintiff for thirty years, E. L. Alexander, former Superintendent of the Edwardsville Public Schools, who had known the plaintiff for thirty years, Clyde Hartung, a lifelong resident of the City of Edwardsville and an alderman, who had known Mr. Tunnell or had known of Mr. Tunnell for many years, Ray Foster, vice-president of the Edwards-

ville National Bank and Trust Company, who had known the plaintiff for thirty or thirty-five years, and F. E. Springer, an attorney who had practiced in Edwardsville for forty-two years and had known the plaintiff all of his life. These witnesses testified that the plaintiff had a good name and a good reputation as a law abiding citizen and he was held in high esteem among his acquaintances and the general public (Abs. 41-44).

CLARENCE ANDERSON, author of the article in question, was called as a Court's witness and gave the following testimony:

Cross-Examination, by Mr. Mudge

On February 23, 1961 I was Assistant to the Publisher of the Edwardsville Intelligencer. I wrote the article identified as Plaintiff's Exhibit No. 1. I am the author of the words "Rumors on the main stem today had it that Attorney Tunnell was working to break the law whether it was the City or State law it was not explained". This is the way I wrote it. I don't remember if I consulted anyone else in a position of authority on the paper before publishing the article. I had several sources of information on which I based this article. They were the city ordinances, state law, the mayor, and the chairman of the Police Commission. I am not a lawyer. There was controversy at the time between Mayor Straube and Orval Legate, Chairman of the Board of Police and Fire Commissioners, as to whether or not Legate was legally a member of the board. Orval claimed he was legally a member and Mayor Straub said he wasn't. I am not sure that you would say we took Legate's side of the matter but by using the ordinances and state law we reported that as a news item. Mr. Legate did not tell me about rumors that Mr. Tunnell was working to break the law. I believe I talked to Mayor Straube. I cannot say that Mr. Legate ever used the word "break" in describing Mr. Tunnell's actions or intentions.

Q. Did Mr. Straube, who was Mayor at the time, say to you that Attorney Tunnell was working to break, using the word break, the law or any law?

A. I think his comment was "If that's a law then the damn thing should be changed".

Q. Mr. Straube told you that in his opinion if that was the law then the damn thing should be changed?

A. Yes.

Q. And did he tell you that that was Mr. Tunnell's opinion?

A. I don't know if he conferred with Mr. Tunnell.

Q. So Straube expressed to you his opinion about what should be done if that is the law?

A. I would say so, yes.

Q. And he did not tell you either that that was Mr. Tunnell's opinion or that Mr. Tunnell was working to break that or any other law, is that correct?

A. Yes, I would say that is correct. I talked to Mr. Legate about the law and he expressed his opinion.

Q. Did he tell you what Mr. Tunnell intended to do about the law?

A. I wouldn't think so, no. I don't think he would know what Mr. Tunnell intended to do.

Q. If Mr. Straube and Mr. Legate discussed the question with you, and neither one of them told you what Mr. Tunnell's opinion was, or what Mr. Tunnell intended to do, where did you get the information upon which you based the story in which you say "Attorney Tunnell was working to break the law?"

A. It was based upon Mr. Straube's statement, "If this was a law, it should be changed", and Mr. Tunnell being a city attorney would certainly be the logical one if you are going to change a city ordinance. City attorney is the one who draws up the city ordinances. That is my understanding anyway. Mr. Tunnell was not a legislator, he was City Attorney. I continued in my employment with the Intelligencer until 1966.

Q. Do you think the word "break" means change?

A. Yes, sir. The word break can be taken two ways. There is the kind of break when someone robs a gas station and another kind when the Attorney General of the United States talks about breaking up organized crime and breaking a law may mean changing it.

Q. When you printed this article and the basis for it was that you had a conversation with the Mayor himself, why did you say that "Rumors on the main stem". Why didn't you say, "Mayor Straube told me if that's the damn law, we'll get it changed?"

A. Well, because a lot of time in reporting articles and I think it is evident now particularly in Washington, D. C.

Q. Well, forget Washington, D. C.

A. Well, all right.

Q. Why didn't you say, Bill Straube?

A. Well, because he didn't want his name used.

Q. And you say that Mayor William C. Straube didn't like for his name to be in the paper, or to be quoted, or to be used. He was spouting off all the time.

Mr. Baetz: Let him answer the question please.

Q. You are saying that Bill Straube did not want to be put in the newspaper?

A. In that particular instance, no. As I recall it.

Q. Then why did you say, well let me ask this. It is a fact that it is not true that there were rumors on the main stem. Isn't it a fact, what you say was a rumor on the main stem you got from a conversation with the Mayor of Edwardsville?

A. That is correct.

Q. That is not a rumor on the main stem, is it?

A. I would say so.

Q. Okay. And you also talked to a man who claimed to be Chairman of the Police and Fire Commissioners, Mr. Orval Legate?

A. Yes, sir.

Q. What did you consider the main stem, Main Street?

A. Main Street, main line of thought.

Q. Rumors on the main stem means to you main street or the main stem of thought?

A. I would think so. I think I talked to Mr. Legate once on that particular article. I had been in Edwardsville about 3 weeks. I had talked to Mayor Straube 3 or 4 times by then and I had never talked to Mr. Tunnell. I knew where his office was. It was in the Edwardsville National Bank Building. I was interested in reporting the news accurately to our readers. There was an election for Mayor about a month later.

Q. You individually, and in your capacity as Assistant to the publisher of the newspaper, vociferously, frequently, almost daily, had articles in the newspaper from that day through the election lambasting William C. Straube and everyone he had appointed to office in an effort to defeat him and to elect Mr. Rogers as Mayor of Edwardsville, isn't that true?

A. No, sir.

Q. What part of that statement is not correct?

A. I don't feel that we tried to lambaste anyone. I did personally support Mr. Rogers for Mayor. I wrote editorials supporting Rogers. We found fault in our editorials with Straube administration.

As I recall, I tried to ask Mr. Tunnell what his intentions were. I think I went to his office and he wasn't there. He was at the City Council meetings which I attended. I did not ask him about his intentions. While I was writing the story I did try to contact him. I either called on the phone or went to his office.

I think I tried to contact him about this article. I did this the same day the article was published. I had talked to Legate and Straube the same day or the night before.

During this period of time I never intentionally deceived the public by anything I wrote in the newspaper.

While I was working for the Intelligencer I did write a letter to the Editor of the Intelligencer and signed the name "Peter Johnson".

When I gave my deposition February 11, 1966, I said that maybe the word "break" carries a bad connotation. I do think it would have been clearer if I had used the word change and say he was trying to change the law.

Q. Now when did you decide that it would have been better if you had used the word changed? Since we are here in the privacy of this Court and jury, or did you decide that sometime earlier?

A. Well, I think when Mr. Tunnell filed the lawsuit was when I perhaps decided it was a bad choice of words.

Q. All right. Did you ever retract that statement?

A. No, sir.

Q. Would you like to retract it now?

A. No, sir.

(An objection was made to the last question and answer which was sustained and the jury was instructed to disregard them.)

We did not write any article later explaining what we meant by "Rumor has it that Attorney Tunnell was working to break the law".

The circulation of the Intelligencer was between 5500 and 6500. It is a daily newspaper.

I don't know of any efforts on the part of Mayor Straube or Robert Tunnell to have the law changed although Orval Legate talked to Senator Paul Simon, who I think introduced some legislation.

Our policy about printing rumors depended on where they came from. We authenticated rumors to the best of our ability. We tried to check with Mr. Tunnell but couldn't find him. It wasn't necessary that we print the story on February 23 rather than the 24th, 25th, 26th, or later. I mean the world wouldn't come to an end if we would have printed it on that particular day.

Cross-Examination, by Mr. Baetz

There was an election coming up in 6 weeks. We couldn't be for Mr. Rogers without being against Mr. Straube. We didn't think the city was making any progress with Mayor Straube in office. We needed a fire station, a city hall, roadwork, traffic controls, sewer extensions, and the water main project was kind of a fiasco. Mr. Straube had been mayor off and on for 16 years. We did not know or hear of any dishonesty in the Straube administration and the paper believed Mr. Tunnell was a competent city attorney.

Q. Now, you know what this article is about? You wrote it?

A. Yes, sir. I was talking about a state law that set up the police and fire commission and the passing of a city ordinance. I believe the state law was a permissive legislation (providing for a fire and police commission).

I thnk Mr. Tunnell made the statement that he didn't know such a state law existed. Mr. Tunnell said at a City Council meeting that he didn't know of the existence of a law under which the city was operating. It was my understanding that Tunnell did not know about the city ordinance under which the city was operating.

I would like to think that Mr. Tunnell learned about the existence of these laws after we published the article about them. I don't believe he knew about them before we published the article. I had been a newspaperman for about three years at that time. I had not attended journalism school. My first employment was in Holyoke, Mass., for the Transcript Telegram. Then I went back to college for a year and a half studying sociology working with disturbed children. Before that I had attended Holyoke Community College studying liberal arts. I am 34 years old. I wrote the article about 11:00 A. M. We went to press at 4:30 P. M.

(Offer of proof outside the presence of the jury.)

Plaintiff offered in evidence a letter to the editor of the Intelligencer signed "Peter Johnson" admittedly written by Clarence Anderson while he was Assistant Publisher for the purpose of impeaching his credibility when he testified that he never intentionally deceived the readers of the Intelligencer. Defendant's counsel objected and was sustained. Plaintiff's attorney made an offer of proof which was objected to and the objection was sustained.

I, Clarence Anderson, wrote the letter signed "Peter Johnson."

It was a pseudonym that I use. The letter appeared in a portion of the paper known as "Matter of Opinion Column." The column was used for letters to the Editor or some other person and for general circulation.

(Back in presence of Jury.)

Plaintiff's Exhibit No. 1, the article which allegedly libeled the plaintiff was read to the jury by plaintiff's attorney.

Cross-Examination, by Mr. Mudge

Subsequent to the publication of the article in question I received a promotion to General Manager and Editor. I held that position until February of 1966 when I moved to my present position in Massachusetts with the same interests (the same people who employed him in Edwardsville.) In my deposition I said that I couldn't truthfully say that Mayor Straube said he didn't want to be quoted. That was a truthful answer. In the deposition I said that I couldn't say that Legate did not want to be quoted. That was also a truthful answer.

In the article I was referring to the state law that permitted a city to set up a Board of Police and Fire Commissioners and the City Ordinance providing for the Board. Those are the laws Tunnell told the City Council he was

not familiar with. I say it was true that there were rumors on the main stem that Mr. Tunnell was working to break those laws.

Q. Now, is it true that Attorney Tunnell was working to break the law? If you don't know, just say you don't know.

A. I don't know.

Q. Now, you say that there was a rumor, you say that it was true that there was a rumor that he was working to break the law?

A. Yes, sir.

Q. And the source of that rumor was from Orval Legate and William C. Straube, who was the Mayor at that time, is that correct?

A. That is correct.

Q. And the source of that rumor was from no other persons except those two?

A. To the best of my knowledge, just those two, yes.

Q. And did either of those two, in their conversation with you, say that R. W. Tunnell was working to break any law? Did they use those words, either one (of them)?

A. I would say yes.

Q. Well, isn't it true that yesterday you said neither one of them used the work break?

A. I believe I said one said he was either going to change or break the damn law, is what I said.

Q. Now, I will ask you again, did either Mayor Straube or Orval Legate tell you specifically that Attorney Tunnell was working to break the law, using the word "break"?

A. No, I think I said specifically I can't say yes they said that. I said they could have said break or could have said change. I mean, six years ago . . .

The attorney representing the newspaper discussed the case with me shortly after it was filed.

I have made an effort to recall specifically the source of the information upon which I based the article.

I don't think the word break has a bad connotation in the way I used it in the article (Abs. 45-58).

Robert W. Tunnell testified that at the time of the trial he was a teacher of business law, real estate and political science at Lincoln College, Lincoln, Illinois, that he had been licensed to practice law in Missouri since 1921, in Illinois since 1922, and in New Mexico since 1947 or 1948. He was sixty-nine years old, a graduate of Washington University Law School and practiced law in Edwardsville from 1922 until 1948. He was twice the Republican nominee for probate judge and once for circuit judge. He had taught at Washington University Law School, at Southern Illinois University, at Carbondale, and at Bradley University, before his appointment in the summer of 1960 as city attorney of Edwardsville by Mayor Straube. He held this part time job for about ten months. Straube's term expired in the spring of 1961 and he was defeated for re-election (Abs. 58-59). Tunnell did not tell the city council he was unfamiliar with the statutes relative to the powers of the Board of Fire and Police Commissioners. He did not inform the city council that in his opinion such a statute could not be passed in Illinois. He stated he knew about the statute, he had never heard any rumors that he was trying to break the law, he at no time attempted to break or change the law and he was never interviewed by a reporter or anyone else representing the Intelligencer concerning the subject matter of Plaintiff's Exhibit No. 1 (Abs. 53-56). He had never met Clarence Anderson, author of the article, until Anderson's deposition was taken in this case. Tunnell continued to practice law in Edwardsville until December of 1962 when he closed his office and moved to Lincoln, Illinois, where he accepted the teaching position (Abs. 60). He researched various questions relative to Legate's position as a member of Board of Fire and Police Commissioners and advised the Mayor that Legate had never qualified as a commissioner and the

Mayor had the authority to appoint someone else (Abs. 60). In response to questions propounded by the defense attorney, Tunnell referred to other articles which had been printed in the Intelligencer (Abs. 61). These articles were introduced into evidence as Plaintiff's Exhibit 3 (Abs. 63), Plaintiff's Exhibit 5 (Abs. 65), and Plaintiff's Exhibit 4 (Abs. 69). As Straube's appointee he was politically aligned with him, but Tunnell did not make any speeches or statements or write any advertisements or other campaign material during Straube's campaign for re-election. Further evidence of defendant's ill will towards plaintiff appears in Plaintiff's Exhibits 3, 4 and 5.

Lena Tunnell, plaintiff's wife, testified that the publication of the article in question affected her husband's health and that shortly after the publication he was hospitalized for three or four weeks (Abs. 44).

Despite the verdict in favor of the plaintiff awarding the plaintiff punitive damages in the sum of $35,000.00 the trial court entered judgment for the defendant after ordering:

> "That the verdict of the jury is contrary to law, and that there is no basis for libel under the facts and the law. That the verdict of the jury is in favor of the defendant. Judgment is hereby entered in favor of the defendant and against the plaintiff, that plaintiff take nothing by his suit against the defendant, and that defendant go hence without day and at plaintiff's cost" (Abs. 30).

Plaintiff appealed to the Appellate Court of Illinois, Fifth District. During the pendency of the appeal plaintiff died and his widow, Lena S. Tunnell, in her capacity as Executrix of the Will of Robert W. Tunnell, Deceased, was substituted as plaintiff. On August 14, 1968, the Appellate Court reversed the trial court and entered judgment on the verdict in favor of the plaintiff and against the defendant in the amount of $35,000.00 and costs. (99

Ill. App. 2d 1, 241 N. E. 2d 28.) Thereafter, defendant's petition for leave to appeal from the Appellate Court to the Supreme Court of Illinois was allowed and on September 26, 1969, the Supreme Court of Illinois reversed the judgment of the Appellate Court. Plaintiff filed a petition for rehearing which was denied November 25, 1969. (S. Ct. No. 41,687, 252 N. E. 2d 538.)

RAISING OF CONSTITUTIONAL QUESTIONS

The applicability of Amendments I and XIV of the Constitution of the United States was inherent from the inception of this case. The complaint for libel was couched in the language of the Supreme Court of the United States in New York Times Co. v. Sullivan, the defense was based on the same constitutional provisions, and the opinion of the Appellate Court of Illinois was based on the authority of the same decisions of the Supreme Court of the United States that the opinion of the Supreme Court of Illinois referred to as governing the merits of this case.

NO REVIEW OF FEDERAL COURT DECISIONS SOUGHT

No review of any federal court judgment is sought by this petition.

ARGUMENT AND REASONS FOR THE ISSUANCE OF WRIT

I

Plaintiff proved the defendant was guilty of "actual malice" as defined in Times v. Sullivan and Curtis v. Butts.

The offensive statement about plaintiff was as follows:

> **"Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained".**

Clarence Anderson who was the assistant to the publisher of the Edwardsville Intelligencer on February 23, 1961, the day he wrote and published the article in question testified. An examination of his testimony (Abs. 45-58) will reveal that Anderson knew that the statement about Tunnell "working to break the law" was totally false. This knowledge of the falsity of the article is sufficient, standing alone, to establish malice as defined in New York Times v. Sullivan and Curtis v. Butts. Additional evidence of defendant's malice is found in plaintiff's Exhibits 3, 4, and 5 (Abs. 87-93).

In New York Times v. Sullivan, 11 L. Ed. 686 at 708, the Court said:

> "We hold today that the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action the rule requiring proof of actual malice is applicable".

At pages 710 and 711, the Supreme Court evaluates the evidence offered in the Times case and finds that it was not sufficiently strong to prove actual malice or that the libelous statements were made of and concerning the

plaintiff. In other words, the Supreme Court found, as to proof of malice, the jury's verdict was against the manifest weight of the evidence.

However, in Curtis Publishing Company v. Wallace Butts, 18 L. Ed. 1094 at page 1101, the Court cites with approval the holding of the trial court as follows:

> "There was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not".

In the Butts case at 1112, the Supreme Court said elementary precautions were ignored, the Saturday Evening Post had printed a story based on an affidavit given it by a man named Burnett who purportedly overheard a telephone conversation between Butts and the Coach of the University of Alabama football team. No attempt was made by the Post to determine the accuracy and truthfulness of the affidavit given it by Burnett. This was sufficient evidence of a reckless disregard for whether or not the report was true to sustain a finding of actual malice on the part of the magazine.

Plaintiff's evidence of actual malice is stronger than the evidence offered in the Butts' case. Clarence Anderson, author of the article in question, testified he was assistant to the publisher of the Edwardsville Intelligencer and he wrote the article and had it published without consulting anyone else. He said he had several sources of information upon which he based the article and then identified his sources as William C. Straube, Mayor of Edwardsville, and Orval Legate, formerly chairman of the Board of Fire and Police Commissioners. He admitted he never interviewed Tunnell. He admitted the only opinion expressed to him about what should be done about the law was the opinion of Mayor Straube (Abs. 46-48). Straube did not tell Anderson what Tunnell's

opinion was or whether Tunnell was working to break that or any other law. Legate did not tell Anderson what Tunnell intended to do or what Tunnell's opinion was. Anderson, when asked upon what information he based the statement that Attorney Tunnell was working to break the law, said the statement was based upon Straube's statement that if this was a law it should be changed (Abs. 47). According to Anderson, neither Legate nor Straube undertook to tell him anything about Tunnell's intentions or opinions concerning any laws. It is apparent, he heard no "rumors on the main stem" or any other rumors, or any statements made by Legate, Straube, Tunnell, or anyone else making any reference to Attorney Robert Tunnell's opinion or intentions on any subject. The statement "Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained", was wholly false and untrue. Defendant, through its agent, Clarence Anderson, was guilty of actual malice as defined in Times v. Sullivan and Curtis Publishing Company v. Butts because the evidence showed without question that the author of the article knew it was false.

The record contains no evidence whatsoever indicating Attorney Tunnell in his capacity as city attorney of Edwardsville had any intention of taking any action of any kind relative to changing, breaking, or amending whatever laws the newspaper had in mind when it printed the article in question. The plaintiff testified he knew about the statutes and city ordinances relative to Boards of Police and Fire Commissioners. He had never heard any rumor on the main stem or anywhere else that he was working to break the law; and he at no time took any action to break or change the law (Abs. 59-60).

Proof of defendant's malice was conclusive.

The Appellate Court's reference to St. Amant v. Thompson (390 U. S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323), and the quotation from that opinion and from the opinion in Beli v. Orlando Daily News, Inc., 389 Fed. 579, aptly pinpoints the applicable law in reference to proof of actual malice (Appendix A, p. A-22).

II

The instructions given by the trial court imposed on plaintiff a greater burden of proof than the law requires.

a

The Court should have given plaintiff's Instruction No. 4 as follows:

> "The Court instructs the jury as to the meaning of 'actual malice' as used in these instructions. If you believe from the preponderance of the evidence that the defendant had knowledge that the statement about plaintiff's intention to break the law was false or that the defendant published the statement with reckless disregard of whether it was false or not then the defendant is guilty of 'actual malice' ".

This definition of actual malice was approved in New York Times v. Sullivan, 11 L. Ed. 2d 686, 706, and again in Curtis Publishing Company v. Butts, 18 L. Ed. 1094, 1115, defining actual malice as "with the knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not".

b

The Court refused other instructions submitted by the plaintiff which plaintiff believes was erroneous but does not make a point of it in this petition. The Court did give the following instruction without any objection from the defendant:

"The jury is instructed that in determining the meaning of the words referring to Mr. Tunnell in the newspaper article of February 23, 1961 you are to take the words used in the sense which readers of common and reasonable understanding would ascribe to them, that is, according to their common and ordinarily accepted meaning".

(Plaintiff's Inst. No. 9, Abs. 77.)

Plaintiff's Instruction No. 9 was not only given without objection from the defendant but has been a standard, unquestioned instruction in Illinois for many years. The Supreme Court of Illinois on the last page of its opinion undertook to criticize this instruction saying,

"This instruction failed to anticipate the movement away from objective standards of reasonable or reckless conduct, and toward an emphasis upon the subjective frame of mind of the actor, which has characterized the development of the new constitutional common law of libel."

This criticism of the instruction was not bolstered by any reference to opinions of the Supreme Court of the United States and failed entirely to take into consideration the other instructions given to the jury relating to the question of actual malice. The author of the article testified and was given ample opportunity to explain to the jury what he meant by the words he employed in the article.

The Court also gave the following Instructions:

"The Court instructs the jury as to the issues in the case: The Plaintiff claims that the defendant published a certain article which has been introduced in evidence, on February 23, 1961, that said article was placed in general circulation, that the last sentence of said article, to-wit: 'Rumors on the main stem today had it that Atty. Tunnell was working to break

the law, whether it was the city or state law was not explained' was and is wholly false and untrue, that the defendant composed, printed, published and circulated said article, and particularly the last sentence thereof, as aforesaid, with actual malice, that is to say: with knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not, that at the time of the publication of the article plaintiff was an attorney engaged in the general practice of law, and that he was the corporation counsel of the City of Edwardsville, and that the publication of the article damaged him.

The defendant admits the publication and circulation of the article, but denies that the statement, to-wit: 'Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained' was wholly false and untrue, denies that the statement was made with actual malice and says that the statement was based on information which defendant knew or had reason to believe was reliable and the statement was made in an effort to report news. The defendant denies that plaintiff was damaged by the article."

(Plaintiff's Inst. No. 1, Abs. 72-73.)
(Given over Defendant's objection.)

"The defendant is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant corporation."

(Plaintiff's Inst. No. 2, Abs. 73.)
(Given without objection.)

"When I say that a party has the burden of proof on any proposition, or use the expression 'if you

find', or 'if you decide', I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true."

(Plaintiff's Inst. No. 3, Abs. 74.)
(Given without objection.)

"The Court instructs the jury that if you find that the article of February 23, 1961 was published with actual malice then the plaintiff is entitled to damages as defined in these instructions. In such case, you may award the plaintiff compensatory damages or punitive damages or both compensatory and punitive damages."

(Plaintiff's Inst. No. 10, Abs. 77.)
(Whether there was an objection is disputed.)

"In considering damages the jury is instructed that there are two kinds of damages. The first kind is what is known as compensatory or general damages. The plaintiff may, but is not required to prove compensatory damages. You should consider the effect, if any, of the newspaper article of February 23, 1961, on plaintiff's reputation.

The second kind is what is known as punitive or exemplary damages and is to be determined separately from general damages. Punitive damages may be awarded to punish or penalize one for actual malice in publishing a libelous statement about an individual; and to discourage the publication of libelous statements about other persons in the future."

(Plaintiff's Inst. No. 12, Abs. 78.)
(Given over Defendant's Objection.)

"In considering punitive damages you may consider the amount of circulation of the defendant."

(Plaintiff's Inst. No. 13, Abs. 79.)
(Given over Defendant's Objection.)

"The Court instructs the jury as to the form of your verdicts:

If you find the issues in favor of the plaintiff and against the defendant and find the plaintiff is entitled to recover compensatory damages only, then the form of your verdict will be:

> 'We, the jury, find the issues in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages at $..... Dollars.'

If you find that the plaintiff is entitled to both compensatory and punitive damages, then the form of your verdict will be:

> 'We, the jury, find in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages in the sum of $..... Dollars and punitive damages in the sum of $..... Dollars.'

If you find the issues in favor of the defendant, and against the plaintiff, then the form of your verdict will be:

> 'We, the jury, find the issues in favor of the defendant and against the plaintiff'."

(Plaintiff's Inst. No. 14, Abs. 79-80.)
(Given over Defendant's Objection.)

"The plaintiff has the burden of proving each of the following propositions:
First, that the matter published of and concerning the plaintiff, and of which the plaintiff now complains, was false;
Second, that the matter was composed and published with actual malice, that is, solely for the purpose of causing harm to the plaintiff; and

Third, that the plaintiff was injured in his reputation by the publication of the matter complained of. If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff, but, if on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant."

(Defendant's Inst. No. D-4, Abs. 81.)
(Given over Plaintiff's Objection.)

"The court instructs the jury that plaintiff was a 'public official', and that on the date of the publication he was the city attorney and corporation counsel of the City of Edwardsville, Illinois, a municipal corporation; that the article complained of referred to plaintiff acting in his official position; that said article, even if a defamatory falsehood, was privileged, under the guarantees of freedom of speech and of the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States; and, that in order for plaintiff to recover he must prove that the article in question was made with actual malice by the defendant, that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

(Court's Inst. No. 1, Abs. 81-82.)
(Given without objection.)

"The privilege to report governmental acts or utterances can only be defeated by proving a particular publication was motivated solely by actual malice. Such a report is nonactionable unless published 'solely for the purpose of causing harm to the person defamed'. The burden of proving such actual malice is always upon the plaintiff. Plaintiff must prove

that defendant's news article was conceived or inspired solely because of a malicious design to injure the plaintiff."

(Court's Inst. No. 2, Abs. 82.)
(Given over Plaintiff's Objection)

"The Court instructs the jury that in considering the question of actual malice the entire article published on February 23, 1961 should be considered, together with all the other evidence in the case, in arriving at your conclusion whether or not said article was published with actual malice toward the plaintiff."

(Court's Inst. No. 3, Abs. 83.)
(Given without Objection.)

An abbreviated Supreme Court of Illinois, two members having resigned after the oral argument in this case and prior to the decision, has, in effect, taken this case away from the jury, a practice which has been common with some Appellate Courts and the Supreme Court of Illinois in F. E. L. A. cases despite frequent reversals by the Supreme Court of the United States.

Petitioner respectfully submits that the foregoing instructions given by the Court required the plaintiff to sustain a substantially greater burden of proof than the decisions of the Supreme Court of the United States require. The Supreme Court of Illinois, despite its declaration that the cases decided by the Supreme Court of the United States are controlling, has interpreted said decisions erroneously.

c.

The article complained of law libelous per se.

New York Times v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 95 A. L. R. 2d 1412, 11 L. Ed. 2d 686, 696, 706-711;

Colmar v. Greater Niles Township Publishing Corp., 13 Ill. App. 2d 267, 141 N. E. 2d 652, 654;

Remington v. Bentley, D. C. N. Y. 1949, 88 F. Supp. 166, 167;

Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 576, 577, 578;

Hotz v. Alton Telegraph Printing Company, 57 N. E. 2d 137, 324 Ill. App. 1, 2, 6;

Flannery v. Allyn, 47 Ill. App. 2d 308, 198 N. E. 2d 563, 566, 568;

Cobbs v. The Chicago Defender, 308 Ill. App. 55, 57-59;

Belt v. Tribune Company, 6 Ill. App. 2d 489, 128 N. E. 2d 638, 639-640;

Proesel v. Myers Publishing Company, 24 Ill. App. 2d 501, 165 N. E. 2d 352, 355-358;

Van Norman v. Peoria Journal Star, Inc., 31 Ill. App. 2d 314, 175 N. E. 2d 805, 814;

Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N. E. 2d 1, 3-4;

Cowper v. Vanier, 20 Ill. App. 2d 499, 156 N. E. 2d 761, 762-763;

Coursey v. The Greater Niles Township Publishing Corp., 227 N. E. 2d 164, 167 (affirmed 239 N. E. 2d 837);

Curtis Publishing Company v. Butts, 18 L. Ed. 2d 1094, 1101, 1115, 388 U. S. 130, 87 S. Ct. 1975;

33 Am. Jur., page 88, page 97;

33 I. L. P., pages 371, 378.

The foregoing citations fully sustain Petitioner's argument that the article complained of is libelous per se. This point is made only to demonstrate more fully that the trial court required the plaintiff to sustain a greater burden of proof than required by law, because it rejected plaintiff's argument that said statement was libelous per se and refused to give instructions appropriate in such cases.

CONCLUSION

A published statement that a lawyer intends to "break the law" is libelous per se. The trial court rejected this proposition and by its instructions to the jury required the plaintiff to sustain a substantially greater burden of proof than the law requires.

The law requires and the plaintiff proved the following:

1. The statement about the plaintiff was false.

2. The defendant was guilty of "actual malice" as defined in New York Times v. Sullivan and Curtis v. Butts.

The plaintiff also proved the following:

1. The defendant knew the statement about the plaintiff was false.

2. The words used had a defamatory meaning.

3. The plaintiff suffered damage to his reputation.

4. Defendant's sole intent in publishing the entire article was to harm plaintiff.

Plaintiff having sustained a greater burden of proof than that imposed by the most recent decisions of the Supreme Court of the United States and those decisions being determinative of the issues in this case, plaintiff is entitled to a judgment against the defendant.

The conflict between the rights of individuals to be secure in their good names and reputations and freedom

of the press must be resolved in cases tried before juries in accordance with the rules of law prescribed by this court in the cases cited.

The second to last sentence of the opinion of the Supreme Court of Illinois is in no way supported by the evidence, it deprived plaintiff of his right to a jury trial, and was the only devise available to that court on which to base a reversal of the Appellate Court (A-31).

When state courts have distorted or ignored these rules to the detriment of a free press, this court has granted certiorari and reversed the state courts. An individual is entitled to the same relief when a state court deprives him of a judgment on the verdict of a jury supported by proof of "actual malice".

Wherefore, Petitioner respectfully asks this Court to issue its Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted

LENA S. TUNNELL, Executrix of the Will of Robert W. Tunnell, Deceased, in Substitution for Robert W. Tunnell, Appellee

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APPENDIX A

Opinion

State of Illinois

Appellate Court

Fifth District

Term, A. D., 1968

At an Appellate Court for said Fifth District, State of Illinois, begun and held at Mt. Vernon, in said State, on the 2nd day of January, the same being the First Tuesday in said month of January, 1968, said term of said Court being held according to law.

Present:

Hon. Edward C. Eberspacher, Presiding Justice
Hon. Joseph H. Goldenhersh, Justice
Hon. George J. Moran, Justice
James R. McLaughlin, Clerk
William B. Hollenbach, Bailiff

Court opened by proclamation.
Attest:

James R. McLaughlin
Clerk

Be It Remembered, that afterward, to-wit: On the 14th day of August, A. D. 1968, there was filed in the office of

the said Clerk of said Court, an opinion of said Court, in words and figures following, to-wit:

No. 67-46

In the Appellate Court of Illinois
Fifth District

Robert W. Tunnell, Plaintiff-Appellant, vs. Edwardsville Intelligencer, Inc., a Corporation, Defendant-Appellee.	Appeal from Third Judicial Circuit of Madison County, Illinois — Honorable Fred P. Schuman, Judge

Eberspacher, P. J.

This is a defamation suit wherein the plaintiff, Robert W. Tunnell, a licensed attorney and city attorney of Edwardsville, Illinois, brought suit against the defendant, Edwardsville Intelligencer, Inc., a daily newspaper, for publishing and circulating an allegedly libelous article on February 23, 1961.

The cause was tried before a jury and on May 11, 1966 the jury returned the following verdict: "We, the jury, find in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages in the sum of $ none dollars, and the punitive damages in the sum of $35,000.00 dollars."

The court failed to enter judgment on the verdict but thereafter on June 29, 1966, ruled on defendant's motion for a directed verdict which had been made at the close of all the evidence and filed a written opinion which concluded with the following order:

"That the verdict of the jury is contrary to law, and that there is no basis for libel under the facts and the law.

"That the verdict of the jury is in favor of the defendant.

"Judgment is hereby entered in favor of the defendant and against the plaintiff . . ."

Plaintiff filed his post trial motion which was denied; and the plaintiff then appealed. After the plaintiff had filed his brief and the defendant its answer, a motion was filed in this Court suggesting the death of the plaintiff and moving to substitute Lena S. Tunnell, Executor of the Estate of Robert W. Tunnell, deceased, as the plaintiff. The plaintiff's motion was accompanied with a further motion withdrawing the plaintiff's portion of the appeal that sought a new trial. The defendant filed objection to the motion to substitute and a motion to dismiss alleging that the action had abated upon the death of the plaintiff. There has been no ruling upon the motions and by an order entered by this Court, the motions were taken with the case.

We decide the question of abatement first because if the action abates due to the death of the plaintiff, it would be needless to pass upon the merits of the case.

At common law, and now by statute, a suit in the nature of defamation abated upon the death of either the plaintiff or defendant and was subject to dismissal with prejudice upon such death without the possibility of revivor in the name of a personal representative. Chap. 3, § 339, Ill. Rev. Stat. (1965); Chiagouris v. Jovan, 43 Ill. App. 2d 220, 193 N. E. 2d 205 (1963).

However, a second question is presented when the cause is pending appeal for in that event, the cause of action has gone to judgment and a different situation exists. In

such a case the cause of action ceases to exist, being merged in the judgment, and consequently so long as the judgment remains in force, the doctrine of abatement has no further application, unless the case is one in which the death wholly eliminates the matter in controversy. Wedig v. Kroger Grocery & Baking Co., 278 Ill. App. 378.

In the present case the plaintiff obtained a verdict. However, judgment was never entered upon this verdict. We note that Section 68(2) of the Practice Act requires the Court to promptly enter judgment on the verdict upon its return by the jury. Chap. 110, § 68, Ill. Rev. Stat. 1965. When viewed in this light, the effect of the court's subsequent order was to set aside the judgment which should have been entered on the return of the jury's verdict.

The purpose of this appeal is to substantiate by a reversal in this Court, the validity of the judgment, and thus obtain the benefit of the judgment which should have been rendered on the verdict. This, of course, will be the result if the appeal is successful. It is not as if a judgment had never been obtained, in which case, the cause of action would have abated. By the trial court's action, and this appeal, the judgment is simply held in abeyance and may or may not become effective to the plaintiff, that issue depending entirely upon the determination of the other question in this Court as to whether the court erred in setting aside the judgment. It is our opinion that the effect of the appeal is to suspend the operation of the order setting aside the judgment and to keep alive the judgment until the appeal is determined. It is not a question of whether the cause of action survives, for the cause of action has merged in the judgment and the validity of the judgment is the question at issue.

The question appears to be one of first impression in the State of Illinois as neither of the parties, nor from our own research have we, found any Illinois cases bearing directly upon this issue. However, our opinion is supported by opinions in other jurisdictions which have passed upon the issue. Crawford v. Chicago, Rock Island & Pacific Railway Company, 171 Mo. 68, 66 S. W. 350 (1902); Sarah May Wright, et al. v. Northern Pacific Railway Company, 45 Wash. 432, 88 Pac. 832 (1907).

Under the circumstances of this case it is our opinion that the cause of action had merged into the judgment, that the motion to substitute the plaintiff's executor as the party plaintiff and the motion withdrawing the request for a new trial should be granted, and the defendant's motion to dismiss denied.

The article complained of[1] concluded with the following sentence, on which plaintiff based his complaint:

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[1] The complete article as published on February 23, 1961 follows:

"1956 Referendum Here Set
Up 3-Man Fire Police Board
By Clarence C. Anderson
Of The Intelligencer Staff

Like the old pea shell game, the question of who has jurisdiction in fire and police appointments seemed to be something of a slight-of-hand problem in the city today—at least in some circles.

On May 22, 1956, the citizens of Edwardsville voted by a 2 to 1 margin to set up a police and fire commission. The powers of this commission was adopted and signed into law by Mayor George L. Moorman, Jr., on June 5, 1956.

Ordinance 1011 states: 'There shall be a Board of Fire and Police Commissioners in the City of Edwardsville, Illinois as provided by law, which shall consist of three members appointed by the Mayor with the consent of the City Council.' Section Two further states: 'The Board of Fire and Police Commissioners shall have charge of all appointments to the Fire and Police Departments and shall conduct and hold all entrance and promotional examinations in the manner required by law.'

"Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained."

The local law was given further teeth with the passage of a law by the General Assembly on May 16, 1957 of the Board of Fire and Police Commissioners Act which made a fire and police commission mandatory in municipalities with a population of more than 5000.

Commissioners showed disbelief when City Attorney Robert Tunnell told members of the City Council that he was not familiar with the state statute on the board's powers and duties" but went on to say he did not think such a statute could be passed in Illinois.

Mayor William C. Straube told those present that he had personally reappointed John Schwartzkopf of 110 North Kansas St. every 30 days since his first temporary appointment more than a year and a half ago.

Article 14-10 of the state law entitled, 'Temporary appointments' states: 'In order to prevent a stoppage of public business, to meet extraordinary exigencies, or to present material impairment of either the police or fire department, THE BOARD may make temporary appointments, to remain in force until regular appointments may be made under the provisions of this article, BUT NEVER TO EXCEED SIXTY DAYS.' (Editor's Note: Caps are our own.)

Commissioners pointed out that Mayor Straube had no jurisdiction whatsoever in making a reappointment every 30 days. Chairman Orval W. Legate told reporters that under the law which governs his group that not even the commission itself had the power to extend a temporary appointment more than 60 days. He also pointed out that at no time did a request to take steps to make the appointment permanent come from the Board of Aldermen. The first step in all appointments must come from the Aldermen asking that the existing vacancy be filled. After this request has been made to the Fire and Police Commissioners, the entire process, according to the state law, is then left in their powers.

Article 14-4 of the state law states: 'The board of fire and police commissioners shall appoint all officers and members of the fire and police departments of the municipality, including the chief of police and the chief of fire department unless the council or board of trustees shall by ordinance as to them otherwise provide.'

Another question which arose was who would get the appointment to the fire department. Rule 14-8 states: 'The board of fire and police commissioners shall prepare and keep a register of persons whose general average standing,

If the verdict returned by the jury, which made no award for compensatory damages, precludes recovery by the plaintiff, we need not determine whether a case of actionable libel was presented; as a result we consider first defendant's second contention, i. e. that the verdict finding no actual damages but awarding punitive damages, requires a judgment for the defendant.

On this point defendant relies on the general rule that punitive damages must depend on a concurrent award of actual damages, citing numerous Illinois cases and including Geach v. Olson (1955 C. C. A. 7th Cir.), 211 Fed. 2d 682, where it is stated that Illinois courts follow the rule that punitive damages cannot be allowed without proof of actual damage.[2] None of those cases cited are libel cases; although Reeda v. Tribune Co., 218 Ill. App. 45, concerns a suit against a publisher, in which the court was specif-

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upon examination, is not less than the minimum fixed by the rules of the board, and who are otherwise eligible. These persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination.'

Chairman Legate pointed out that the replacing of John Schwartzkopf was being done in keeping with the law. The temporary appointee had not taken the fire examination because of his age, the maximum age limit for qualification being 35 years of age.

Further impetus was given to the powers of the state law by the law firm of McConnell, Kennedy, McConnell and Morris on Jan. 20, 1959 when they ruled that office of police chief for the city was covered by Section 14-11 of the state law. The ruling was given for a police association of which local law officers are members.

The question of appointments to the fire and police department is not something new according to Chairman Legate who stated he met with Mayor Straube and Atty. Tunnell six months ago to help familiarize them with the existing laws. Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained."

[2] The Federal rule does not require the establishment of actual damages as the basis for the assessment of punitive damages. Wardman-Justice Motors v. Petrie, 39 Fed. 2d 512.

ically advised that the declaration did not proceed on the theory of libel nor on "false words causing damage", and the court found no cause of action stated.

The rule which plaintiff contends is applicable in this case is stated in 33 Am. Jur., Libel and Slander, Sec. 202;

> ". . . where the defamation complained of is actionable per se, it is generally held that punitive damages may be awarded even though the amount of actual damages is neither found nor shown."

That rule has been reiterated in numerous Illinois defamation cases; see Lorillard v. Field Enterprises, 65 Ill. App. 2d 65, p. 78, 213 N. E. 2d 1, p. 7; Wade v. Sterling Gazette Co., 56 Ill. App. 2d 101, p. 106, 205 N. E. 2d 44, p. 47; Cowper v. Vanier, 20 Ill. App. 2d 499, p. 501, 156 N. E. 2d 761, p. 762. In Lorillard (supra) and the other cases cited therein, the Court reiterated the long established rule that in cases of defamatory falsehood, that is, a statement which is libelous per se, both malice and damage to reputation are presumed. However, since the case of New York Times v. Sullivan (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 and Curtis Publishing Co. v. Butts (1967), 388 U. S. 130, 87 S. Ct. 1975, 11 L. Ed. 2d 1094, malice is no longer presumed if the plaintiff is a public official or a "public figure" nor can malice be presumed if the article complained of is a report of governmental acts or utterances. Lulay v. Peoria Journal Star, Inc. (1966), 34 Ill. 2d 112, 214 N. E. 2d 746. However an examination of those cases discloses that the rule with reference to the presumption of damage to reputation in such case is not changed.

To adopt the view that punitive damages in such defamation cases were dependent upon the allowance of actual damages, would be to allow a defamer some immunity because of the excellent reputation of the person defamed, and allow the defamer to become the beneficiary of the un-

assailable reputation of the one defamed. In Butts, supra, the U. S. Supreme Court pointed out "We would hold, therefore, that *misconduct sufficient to justify the award* of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury". (Italics ours) Curtis Pub. Co. v. Butts, 87 S. Ct. p. 1994. They did not state that an *award* of compensatory damages was necessary to justify punitive damages, or that punitive damages could only be awarded when compensatory damages were *awarded.*

We therefore hold that the verdict of the jury was not, as the trial court found and declared, "a finding for defendant"; nor was it a nullity as defendant contends, and a judgment for the defendant was not required by law for the reason that the jury made no award of actual damages, if the language complained of was libelous per se.

Plaintiff, at the time of the trial, was 69 years old and a teacher of business law, real estate and political science at Lincoln College. He had been licensed to practice law in Illinois since 1922, in Missouri since 1921 and in New Mexico since 1947 or 1948. He was a graduate of Washington University Law School and practiced law in Edwardsville from 1922 until 1948. He had taught at Washington University Law School, at Southern Illinois University at Carbondale and at Bradley University before his appointment in the summer of 1960 as city attorney, an office which he held approximately 10 months. He had been twice selected by a major political party as nominee for probate judge and one time as its nominee for circuit judge. His appointment as city attorney was made by the Mayor of the city with whom he was politically aligned, but plaintiff made no speeches or statements nor did he write any advertisements or campaign material during the Mayor's campaign for re-election, which was being carried on at the time of the publication of the allegedly libelous

article. Plaintiff presented ample evidence of his excellent reputation and the high esteem in which he was held by the general public and the members of his profession.

In Whitley v. Associates Discount Corp., 59 Ill. App. 2d 337, p. 340, 207 N. E. 2d 482, Judge Coryn of the 3rd District pointed out that in Illinois there are five classes of words which give rise to a cause of action for slander if falsely communicated, and that a majority of America jurisdictions apply the rules applicable to slander to libel as well; he further pointed out: "If the false words, by their plain, ordinary meaning, and without resort to innuendo, impute anything within the first four offensive categories, the slander is one per se requiring no allegation or proof of special damages". Included among the first four categories are:

1. Those imputing the commission of a criminal offense;

2. Those imputing infection with a communicable disease of any kind which, if true, would tend to exclude one from society;

3. Those imputing inability to perform or want of integrity in the discharge or duties of office or employment;

4. Those prejudicing a particular party in his profession or trade.

Those categories have been reiterated by the First District in Coursey v. The Greater Niles Twp. Pub. Corp., 82 Ill. App. 2d 76, 227 N. E. 2d 164, and approved by the Supreme Court in its recent opinion (filed May 29, 1968) affirming that case. (Docket No. 40649, March 1968.) Here the words may fairly be said to fall into two of the four categories, namely, imputing a want of integrity in the discharge of duties of office, and prejudicing plaintiff in his profession.

Defendant in answering plaintiff's amended complaint denied that the last sentence of the article was wholly false and untrue and denied that it had any knowledge that such statement was false and untrue. We consider the evidence conclusive to the effect that it was wholly false and untrue, as did the trial court. That no such rumor existed at the time the author caused the article to be put into print is the only conclusion that can be drawn from the author's own testimony.

The trial court, after the verdict, found that the article was not libelous per se, apparently adopting the contention that defendant makes in this Court, to the effect that "clarity in thinking will be served if the Court is reminded that modern ruling under both local Illinois law and Federal constitutional limitations, as presently interpreted, are such that it is simply impossible to have a publication libelous per se when the person defamed is a public official". Defendant interprets Lulay v. Peoria Journal Star, supra, and New York Times v. Sullivan, supra, as authority for such proposition, but a careful reading of those cases discloses that they do not render a publication which reports proceedings, or one which has to do with the conduct of a public official, immune from being libelous per se. The short answer to such contention may be found in the Supreme Court opinion in Coursey v. The Greater Niles Twp. Pub. Corp., supra, in which the Court specifically found the alleged publication to constitute libel per se in a case in which the plaintiff was determined by the court to be a public official and within the New York Times guide lines, which in such case require that the public official need allege and prove that the libelous publication was made with knowledge that it was false or with reckless disregard of whether it was false or not. Our Supreme Court in the Coursey opinion leaves no question that the doctrine of libel per se is applicable when the person allegedly defamed is a public official.

Defendant contends that the article was a privileged communication and as such required proof that the publication was made "solely for the purpose of causing harm to the person defamed", and urges that the evidence shows that defendant was reporting and commenting upon governmental matter as it had developed during governmental proceedings and was reporting and commenting during a political campaign which embraced the governmental matter as one of its issues; that the governmental matter was the question of whether the mayor was ignoring an applicable ordinance and statute in making repeated temporary appointments to a post of city employment; the political campaign was a mayoralty contest in which the mayor was running for re-election; the governmental proceedings were meetings of the city council, attended by plaintiff as city attorney and by the mayor; that plaintiff admitted that he had advised and commented on the applicable ordinance and statute, and that plaintiff owed his appointment to the mayor, a friend of long standing. We think the evidence with reference to the matter being privileged is more significant for what defendant failed to prove than the evidence upon which defendant has commented.

There is absolutely no evidence presented that at any of the council meetings supposedly covered that plaintiff did or said anything that could reasonably give rise to a rumor that plaintiff was working to break any law; the mayor is not the person who is complaining of any defamation—plaintiff is and he was not a candidate for any office. There is no evidence that plaintiff was participating in any way in the mayor's campaign for re-election. Although the defendant was attempting to make the question of appointments to the Board of Fire and Police Commissioners an issue in the mayor's campaign for re-election, there is nothing in the record to show that plaintiff, or the mayor on plaintiff's advice, had made this an issue.

Defendant urges its contention of a privileged communication which requires proof that it was made "solely for the purpose of causing harm to the person defamed" is supported by Lulay v. Peoria Journal Star, supra.

In the most recent proclamation in this field, the Supreme Court in Coursey v. The Greater Niles Township Pub. Corp., supra, said:

> "With respect to defendant's contention that the article was a privileged comment on quasi-judicial proceedings, the appellate court correctly stated the controlling principle as expressed in the Restatement of Torts, § 611, that a newspaper is privileged to report the activities of a 'municipal corporation or of a body empowered by law to perform a public duty * * * although it contains matter which is false and defamatory, if it is (a) accurate and complete or a fair abridgement of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed'.
>
> It then noted that the Restatement position was adopted by this court in Lulay v. Peoria Journal-Star, 34 Ill. 2d 112, 115, with that decision being followed by appellate courts in subsequent cases. (E. g., Segall v. Lindsay-Schaub Newspapers, Inc., 68 Ill. App. 2d 209, 215.) However, the court held that 'These decisions are distinguishable from the instant case, for here the defendants published what turned out to be an *inaccurate account* of the proceedings of the Fire and Police Commission. The error was therefore solely attributable to the defendants and hence the matter is not within the privilege hereinbefore discussed.' 82 Ill. App. 2d at 83."

The present case is likewise distinguishable from Lulay and the Appellate decisions following it. Here the language complained of does not purport to be an accurate

or fair report of any governmental proceedings; it purports to be only a report of a rumor current in the community. While it may be true that there was contention among the City Council with reference to the mayor's temporary appointments, the last sentence clearly encompassed the "sting or gist" of the alleged libelous publication. It is that sentence that imputes "want of integrity in the discharge of duties of office" and prejudiced plaintiff in his profession. It cannot be said to be an accurate or fair account of governmental proceedings or of the report of issues in a political campaign, and thereby precludes defendant from invoking the fair comment privilege. See Coursey v. The Greater Niles Twp. Pub. Corp., supra. As a result the trial court erred in holding that the plaintiff was required to prove that the article was motivated by actual malice solely for the purpose of causing harm to the plaintiff.

Defendant has here, as did defendant in Coursey, contended that the article was not defamatory but only capable of an innocent construction. We have pointed out that under the authority of Whitley v. Associates Discount Corp., supra, the language complained of, even when read with the entire article, cannot be read innocently, and are within these categories which constitute libel per se. In Colmar v. Greater Niles Township Pub. Corp., 13 Ill. App. 2d 267, 141 N. E. 2d 652, the Court held an article accusing two lawyers of instigating a lawsuit and charging an "extortionate" fee for their work and that they faced possible disbarment proceedings because of unethical tactics was libelous per se, saying any statement published of an attorney at law with respect to his profession is actionable if it tends to injure or disgrace him as a member of his profession.

In the present case by plaintiff's instruction No. 9, the jury was instructed, without objection from the defendant, that in determining the meaning of the words re-

ferring to plaintiff they were to take the words used in the sense which readers of common and reasonable understanding would ascribe to them, that is according to their common and ordinarily accepted meaning. Obviously the trial court in the first instance, after hearing the testimony of the author, considered the words ambiguous or equivocal in meaning, and under the authority of Ogren v. Rockford Star Printing Co., 288 Ill. 405 the question was properly submitted to the jury.

In John v. Tribune Co., 24 Ill. 2d 437, 181 N. E. 2d 105, our Supreme Court concluded that the publications could not be read as "of and concerning" the plaintiff, since they referred only to a person other than the plaintiff. In its opinion, the Court did not make any reference to Ogren v. Rockford Star Printing Co., supra, and held that the publications were innocent as to the plaintiff since they were not capable of being construed as referring to her. The language there could not be actionable per se because it was held to refer to a person other than plaintiff. Here there is no possible reference to any one other than Attorney Tunnell nor was it contended that he was not the "target".

In our opinion this language was not capable of an innocent construction. The statement that Attorney Tunnell was working to break the law was equally an attack upon his integrity and honesty as an attorney and in his official capacity as city attorney. Such a statement would also subject him to the scorn and ridicule of his fellow citizens and colleagues. An attorney has a special duty, greater than that of his fellow citizens, to respect and uphold the law whatever it may be. It is difficult for an attorney to differentiate between his conduct as a citizen and his conduct in his capacity as an attorney. The newspaper referred to the plaintiff as an attorney and in his capacity as a city attorney and therefore it must be pre-

sumed he was being accused of intending to break the law as an attorney and in his official capacity as city attorney. Such action on his part would have been in violation of his duty as an attorney and as an officer of court as well as in his capacity as city attorney. This kind of accusation would naturally tend to subject the plaintiff to scorn, disrespect, and distrust by his fellow citizens and members of his profession. To publicly accuse an attorney of incompetence or ineptness is bad enough; to accuse him of dishonesty or having formed an intention of breaking the law is inexcusable. It is properly said that any words which charge an attorney with dishonest or improper practices in the performance of his duties as an attorney are actionable per se. 33 Am. Jur., Libel and Slander, Sec. 76.

The jury heard the explanation of the article as presented by the evidence of the author, Clarence Anderson, including his stating that he decided after plaintiff filed suit that the meaning would have been clearer if he had used the word "change" instead of "break", and admitted that he knew of no efforts on the part of the city administration or the plaintiff to have any law changed. Although he testified he had never intentionally deceived the public by anything he had written in the newspaper, he admitted he had written a letter to the editor signed "Peter Johnson", while employed by defendant; he also testified that he was the assistant to the publisher. Not only did his testimony show that he had serious doubts as to the truth of the publication but reasonable men could from that testimony only conclude that Anderson knew that the language complained of was not true, and his awareness of the fact that he was originating and causing false information to be circulated. His use of a libel against plaintiff cannot be rationalized as resulting from the heat of a political campaign in which plaintiff was not involved.

In New York Times Co. v. Sullivan, supra, the Court held that the first and fourteenth amendments delimit a State's power to award damages to a public official in a libel action for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is with knowledge that it was false or with reckless disregard of whether it was false or not. Coursey v. The Greater Niles Twp. Pub. Corp., supra. By Curtis Publishing Co. v. Butts, supra, the U. S. Supreme Court required the same degree of proof for those characterized as "public figures" on the theory that "public figures" as do public officials, command sufficient continuing public interest and have sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies of the defamatory statements".

We find no reported cases holding that a city attorney is a public official within the rules affording freedom of comment upon him. On the authority of Illinois court decisions and opinions of the Attorney General, his position is described in 8 I. L. P. 244.[3] We believe the position of city attorney as therein described, has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs. One in such position is thrust into public controversy, as plaintiff

[3] "He is the law officer of the city, not a mere servant of the city council; rather he is the legal adviser of the council and of all city officers, under a duty to advise the city officers with respect to their powers and duties, and he represents the city in all legal matters.

"While he is bound to obey the directions of the city council concerning litigation with respect to matters wholly within control of the council, in matters which merely concern the public, which are for preservation of morals and maintenance of good order, the abatement of public nuisances, and the destruction of dens of vice and infamy, he is wholly independent of the city council and is a servant of the People, and as to such matters is vested with powers and burdened with duties over which the council has no jurisdiction."

was by defendant in the present case, and at least has the public meetings of the City Council for a forum in which to expose through discussion the falsehoods and fallacies of the defamatory statement. Plaintiff therefore was required to overcome the New York Times Co. v. Sullivan, supra, constitutional protection by proving that the defamatory statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

Plaintiff's amended complaint which by reference incorporated the entire article, charged actual malice couched in the language of New York Times v. Sullivan, supra, as follows:

> "The defendant composed, printed, published and circulated said article, and particularly the last sentence thereof, as aforesaid, with actual malice, that is to say: With knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not."

The trial court, however, refused to instruct the jury defining actual malice as with the knowledge that it was a false and untruthful statement or with reckless disregard of whether it was false or not, but instead instructed, over plaintiff's objection, that plaintiff had the burden of proving "that the matter was composed and published with actual malice, that is, solely for the purpose of causing harm to the plaintiff"; in addition, the court gave its own instruction[4] regarding plaintiff's burden of proving

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[4] It is also to be noted that the court gave its own instruction declaring plaintiff to be a public official and "that said article, even if a defamatory falsehood, was privileged, under the guarantees of the freedom of speech and of the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and, that in order to recover he must prove that the article in question was made with actual malice by the defendant, that is, with knowledge that it was false or with reckless disregard of whether it was false or not".

actual malice which advised the jury, "Plaintiff must prove that defendant's news article was conceived or inspired solely because of a malicious design to injure the plaintiff." Despite the fact that the instructions imposed a greater burden of proof than the law imposes, the jury found for the plaintiff. It must be assumed that the jury followed the instructions, and in awarding plaintiff a verdict for punitive damages actually found the plaintiff had been injured in his reputation but simply did not award compensatory damages, realized that both plaintiff's general and professional reputation in the community was of such calibre that it could withstand, without destruction, such rumors, even if they existed. Such reasoning on the part of the jury is particularly logical in view of the fact that they were given plaintiff's instruction No. 10, which was:

> "The Court instructs the jury that if you find that the article of February 23, 1961 was published with actual malice then the plaintiff is entitled to damages as defined in these instructions. In such case, you may award the plaintiff compensatory damages or punitive damages or both compensatory and punitive damages."

While this instruction was commented upon by defendant's counsel, the court treated the comments as an objection which was overruled, but in no sense can the comments be interpreted as an objection to the language to the effect that the jury could award either compensatory or punitive damages, or both.[5] In view of defendant's

[5] Defendant's counsel's comment was: "We are dubious. Under Sullivan, actual malice is necessary, and under Lulay, actual malice may consist only in a pointed effort to harm the plaintiff, alone. We also believe Sullivan would require a differentiation between compensatory and punitive damages in the pleading and in the instruction and in the verdict; and we believe that Sullivan, in its general aspects, would require proof of damage before damages (compensatory) could be awarded."

failure to make a specific objection (that punitive damages could not be awarded without an award of compensatory damages; the position which defendant takes on appeal) there is a serious question whether defendant should now be allowed to be heard to make such contention in this Court, although we have considered that contention.

We have previously commented on the testimony of the author and his explanation of the article. He testified that he considered that there was such a rumor because of discussions he had engaged in with Legate who contended he was legally a member of the Board of Commissioners and the mayor who contended he was not. He admitted that neither of them told him of any intentions of plaintiff to either break or change any law; that he did not know whether the mayor had discussed the matter with plaintiff and that although he was present at council meeting when plaintiff was present, and the appointments were discussed, the author had never discussed the matter of appointments, the ordinance or statute, with plaintiff. He testified that the sole basis of the story was a conversation he had with the mayor in which the mayor stated, "If this was a law, it should be changed." He testified that he did not publish the fact that the mayor made such statement in connection with the matter because the mayor did not wish his name used in connection with the matter, although he admitted that defendant frequently found fault with the mayor's administration in their editorials supporting his opponent. Numerous publications of defendant were introduced into evidence attacking the mayor and using his name, as well as making derogatory remarks about plaintiff.[6]

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[6] In one of the editorials the opening paragraph set forth the first amendment of the Constitution of the U. S., and accused plaintiff and the mayor of making a travesty of it, and justice; in the same editorial the author stated that Americans had

He testified that the paper did not try to "lambaste anyone". From this evidence reasonable men might very well conclude that the libelous material was composed and published with a "malicious design to injure the plaintiff."

The author also testified that he composed the article complained of at about 11:00 A. M. on the date of publication and that the paper in which it was included went to press at 4:30 P. M.; that he had never asked plaintiff what his intentions were, but thought he had tried to contact him either by telephone or going to his office while writing the story. He admitted that it was about six weeks before the mayoralty election which defendant sought to influence and that it was not necessary that the article be published on February 23 rather than a few days later, after an opportunity to authenticate the story. As was said in Curtis Publishing Co. v. Butts, supra:

> "In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

The jury was by the evidence, justified in determining that no investigation was made of plaintiff's attempts or intents with reference to either the state law or city ordinance, and no effort made to determine if rumors concerning plaintiff's attempts or intent existed, and that defendant was in "reckless disregard or whether it was false or not."

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been in at least 8 recorded battles defending principles which they thought were right, in which 1,096,917 were killed and 1,276,520 were wounded, and referring to plaintiff continued "The usurping of the ideals for which these men fought and died, just as denying a man an opportunity to defend himself is unexpressable". In conclusion the editorial accused plaintiff of participating in a mockery "blindfolding all forms of justice and human decency".

In St. Amant v. Thompson, ... U. S. ..., 88 Sup. Ct. 1323, 20 L. Ed. 2d 262 (1968) the Supreme Court of the United States pointed out:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

In Belli v. Orlando Daily Newspapers, Inc., 389 Fed. 579 (1967), the Court said at page 584:

> "The defendants made a case—just barely—for the view that the article is capable of being reasonably interpreted as non-defamatory. But since the article on its face is also capable of carrying a defamatory meaning, it is for the jury to decide whether the words were in fact so understood."

and at page 585 continued:

> "We hold that a jury might reasonably conclude that the conduct imputed to Belli was incompatible with the standards of an ethical lawyer and as such violated one of the four traditional categories of libel per se" . . . "Any doubt as to the defamatory effect of a publication should be resolved by the common mind of the jury, and not by even the most carefully considered judicial pronouncement."

We conclude that in the present case the trial court erred in its conclusion, arrived at after the verdict, that the alleged libelous material was non actionable as a matter of law and in ordering "that the verdict of the jury is contrary to law, and that there is no basis for libel under the facts and the law"; and in entering a judgment for defendant on a verdict for plaintiff.

We therefore grant plaintiff's motions and deny the motion to dismiss the appeal; we reverse the judgment for defendant and here enter judgment on the verdict in favor of plaintiff, Lena S. Tunnell, Executor of the Estate of Robert W. Tunnell, deceased, against the defendant, Edwardsville Intelligencer, Inc., a Corporation, in the amount of $35,000.00 and costs.

CONCUR: /S/ Joseph H. Goldenhersh
CONCUR: /S/ George J. Moran

PUBLISH IN FULL.

I, James R. McLaughlin, Clerk of the Appellate Court, within and for the Fifth District of the State of Illinois, Do Hereby Certify, that the foregoing is a true copy of the Opinion of the said Appellate Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 14th day of August A. D. 1968.

James R. McLaughlin
(Seal) Clerk of the Appellate Court

APPENDIX B

Opinion

Supreme Court of Illinois

Docket No. 41687—Agenda 36—March, 1969

Robert W. Tunnell v. The Edwardsville Intelligencer, Inc., Appellant.—(Lena S. Tunnell, Executrix, Appellee.)

Mr. Justice Schaefer delivered the opinion of the court:

This case is here on leave granted to appeal from a judgment of the Appellate Court, Fifth District, 99 Ill. App. 2d 1.

The original plaintiff, Robert W. Tunnell, brought this action in the circuit court of Madison County, alleging that he had been defamed in a newspaper article published by the defendant, Edwardsville Intelligencer, Inc., during a mayoralty campaign in the city of Edwardsville. The article charged that the incumbent mayor was ignoring a local ordinance and a State statute by making repeated temporary appointments to the police and fire departments of the city. It referred to Robert W. Tunnell who, as city attorney, had been involved in interpreting the applicable statutes and ordinances, and concluded with the allegedly defamatory statement: "Rumors on the main stem today had it that Atty. Tunnell was working to break the law, whether it was the city or state law was not explained."

The case was tried by jury, and at the close of the evidence the defendant moved for a directed verdict. The trial judge reserved his ruling, and submitted the case to the jury. Among the instructions given was one submitted by the plaintiff which told the jury that if they found that the article was published with actual malice,

"you may award the plaintiff compensatory damages or punitive damages or both compensatory and punitive damages." The jury returned the following verdict: "We, the jury, find in favor of the plaintiff and against the defendant, and assess plaintiff's compensatory damages in the sum of $ None and punitive damages in the sum of $35,000."

The verdict was returned on May 11, 1966. The trial judge did not at once enter judgment on the verdict in accordance with section 68(2) of the Civil Practice Act. (Ill. Rev. Stat. 1965, ch. 110, par. 68(2).) On June 29, 1966, he ruled upon the defendant's reserved motion, set aside the verdict and entered judgment for the defendant. Thereafter the court overruled the plaintiff's post-trial motion, and the plaintiff appealed.

After the briefs of both parties had been filed in the appellate court, Robert W. Tunnell died and his executor, Lena S. Tunnell, sought to be substituted as plaintiff. The defendant moved to dismiss the appeal on the ground that the plaintiff's death caused the action to abate. The appellate court allowed the substitution, and on the merits reversed the judgment for defendant and entered judgment for plaintiff. 99 Ill. App. 2d 1.

We first consider the appellate court's ruling on the abatement issue, for if the action abated it will be unnecessary to review the issues that are ruled upon the merits.

At comon law, a cause of action for a purely personal injury did not survive the death of either the injured party or the wrongdoer. Actions for libel and slander—based on injury to a most intimate human quality, reputation—were clearly of the sort which did not survive (*Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P. 2d 133; *Benton v. Knoxville News-Sentinel Co.*, 174 Tenn.

658, 130 S. W. 2d 105) and a pending defamation action was held to abate upon the death of either party. (See Anno. 134 A. L. R. 717.) While section 339 of the Probate Act has reversed the general rule with regard to the abatement of actions for personal injury, actions for slander and libel are specifically excepted from the statute, and remain subject to the common-law rule. Ill. Rev. Stat. 1965, ch. 3, par. 339; see *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209; *Chiagouris v. Jovan*, 43 Ill. App. 2d 220.

Even as to actions which do not survive, however, there is no abatement upon the death of a party if the litigation has progressed to a point at which the merits of plaintiff's allegations have been affirmatively determined. This principle is most frequently applied in those cases in which the plaintiff has secured a judgment after a trial. The death of either party pending an appeal from that judgment will not abate the action. The cause of action is said to have merged in the judgment and, thus, the common-law rule of abatement is inapplicable. (*Castelluccio v. Cloverland Dairy Products Co.*, 165 La. 606, 115 So 796; *Gordon v. Hillman*, 102 Wash. 411; 173 Pac. 22; *Akers v. Akers*, 84 Tenn. 70. So too, when a plaintiff dies after having received a verdict in his favor but before the entry of judgment, his action does not abate and he is entitled to judgment upon that verdict. *Garret v. Byerly*, 155 Wash. 351, 284 Pac. 343; *Rosenblum v. Ginis*, 297 Mass. 493, 9 N. E. 2d 525; *Hilker v. Kelley*, 130 Ind. 356, 30 N. E. 304.

In the present case, however, the verdict in favor of the plaintiff was subsequently set aside, and judgment was entered for the defendant. There are numerous cases which hold that the death of a plaintiff pending his appeal from a judgment for the defendant in a nonsurviving action abates the action and the appeal must be dismissed. (*Martin's Admr. v. Baltimore and Ohio Railroad Co.*, 151 U. S. 673, 38 S. Ct. 311; *Eades v. House*, 3 Ariz. App. 245, 413

P. 2d 576; *In re Samson's Estate,* 142 Neb. 556, 7 N. W. 2d 60; *Mills v. Alexander,* 206 Ark. 754, 177 S. W. 2d 406; see also *Nicora v. Demosthenes,* 69 Nev. 137, 243 P. 2d 253; but see 1 Freeman, Judgments, sec. 133, p. 250.) Each of these decisions, however, involved a situation in which both the verdict and the judgment were for the defendant in the trial court. They proceeded upon the ground that since the plaintiff does not have a verdict in his favor, "if the judgment below against [plaintiff] * * * be reversed * * *, no new trial could be had, because the action abated by his death." *Martin's Admr. v. Baltimore and Ohio Railroad Co.,* 151 U. S. 673, 703.

The present case does not present that problem. The plaintiff received a verdict in the trial court and when the motion to substitute his executor was made in the appellate court, the plaintiff's post-trial request for a new trial was withdrawn. If the appellate court decided the merits of the case in favor of the plaintiff, there was no need to retry it, for judgment could be entered on the verdict.

In cases like this one, reviewing courts have recognized that it is inappropriate to dismiss an appeal upon the death of the plaintiff-appellant. "Where it is found that the trial court improperly granted a judgment notwithstanding the verdict, it would be an unjust rule that would deny appellant relief as of the date of the submission of the motion. * * *" *Nenezich v. Elich,* 183 Wash. 657, 49 P. 2d 33; see also *Coughlin v. District of Columbia,* 106 U. S. 7, 27 L. Ed. 74; *Carl v. Department of Labor and Industries,* 38 Wash. 2d 890, 234 P. 2d 487; *Craft v. Stone,* 74 Ind. App. 71, 124 N. E. 473.

What is significant in such cases, in our opinion, is not any metaphysical notion of merger of the cause of action into the verdict but rather the circumstance that all factual questions had been resolved before the plaintiff died. No new trial is involved, and the reviewing court is in a

position to determine the controversy on the merits. The present case was ripe for judgment when the plaintiff died, and the appellate court properly held that his death did not abate the action. *Garrett v. Byerly*, 155 Wash. 351, 384 Pac. 343; see also 1 Black, Judgments, sec. 133, pp. 150, 153.

On the merits the case is governed by the decisions of the Supreme Court of the United States in *New York Times Co. v. Sullivan* (1964), 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710; *Garrison v. Louisiana* (1964), 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209; *Curtis Publishing Co. v. Butts* (1967), 388 U. S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975, and particularly by the decision of that court in *St. Amant v. Thompson* (1968), 390 U. S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323. In the latter case the Supreme Court restated the *New York Times* test, that the plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U. S. 254, 279-280, 11 L. Ed. 2d at 706.) Then, conceding that "reckless disregard" cannot be fully encompassed in one infallible definition, the court pointed out that its decisions subsequent to the *New York Times* case had furnished "meaningful guidance for the further definition of a reckless publication", and continued: "Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 153, 18 L. Ed. 2d 1094, 1110, 87 S. Ct. 1975 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with

such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U. S. at 731, 20 L. Ed. 2d at 267.

The court frankly recognized that "such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." Nevertheless the court adhered "to the line which our cases have drawn between false communications which are protected and those which are not." It did so in the belief that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." 20 L. Ed. 2d at 267.

We turn, then, to an examination of the facts of this case in the light of these principles. In the mayoralty election in connection with which the disputed article was published a controversy had arisen, between the incumbent mayor and the person who claimed the office of chairman of the local police and fire commission, over the authority of the mayor to make temporary appointments to the local fire department. On the ground that the man who claimed the office of chairman of the commission had never qualified for that office, the mayor had repeatedly made temporary appointments of a particular individual although a statute and an ordinance apparently vested all power of departmental appointments in the commission.

The author of the article, a reporter and assistant publisher of the defendant, testified that he wrote it on the basis of interviews with the incumbent mayor and the man who claimed to be chairman of the commission. He could not recall whether either of those he interviewed had used the term "break" in describing attorney Tunnell's anticipated action with respect to the applicable

ordinance and statute. He did testify, however, that the mayor had said that if the law was as the chairman of the commission contended, "it should be changed."

The author testified that he felt the word "break" had one meaning which connoted violation and another which implied alteration or change, and that he had intended to convey the latter meaning. Attorney Tunnell testified that he had never done any work either to change or break the law with regard to appointments by the police and fire commission, although he had prepared a statement, read by the mayor at a meeting of the city council, which dealt with the failure of the chairman of the police and fire commission to satisfy the statutory prerequisites of his office.

The *St. Amant* case was tried before a judge who found for the plaintiff, while the present case was tried by jury. But we find nothing in the opinions of the Supreme Court to suggest that this circumstance would justify a relaxation of the standards that have been held to be required by the first amendment. In that case, as in this one, the defamatory utterance was made during an election campaign. The fact that in that case the publication was made by one of the candidates while in this one it was made by a newspaper published for profit, does not appear to justify a difference in the standards by which liability is measured.

The core of the plaintiff's case is the use of the word "break" in the sentence "* * * Atty. Tunnell was working to break the law * * *." The plaintiff would have us view this word in its most unfavorable sense and find that it imputed to Tunnell an intention to violate a law. But this construction is not inevitable, for Tunnell's office did not require him to administer or enforce the statute or ordinance. Responsibility for "changing" the law by drafting a new ordinance or statute, could, however,

reasonably be imputed to the city attorney who was the legal advisor to the mayor. The record shows that a legitimate question existed as to the authority of the incumbent mayor to make temporary appointments in the fire department under the applicable statute and ordinance. The mayor had expressed his dissatisfaction with that legislation, and the author's assumption that Tunnell would be the person most likely to bring about a change is not, therefore, entirely without basis.

The reporter's elaboration of the mayor's remark was singularly imprecise, but the skill and sensitivity of an author's expression does not determine liability. The jurors were instructed that they were "to take the words used in the sense which readers of common and reasonable understanding would ascribe to them, that is, according to their common and ordinarily accepted meaning." This instruction failed to anticipate the movement away from objective standards of reasonable or reckless conduct, and toward an emphasis upon the subjective frame of mind of the actor, which has characterized the development of the new constitutional common law of libel.

The statement here in question was made during a political campaign by a writer who opposed the re-election of the incumbent mayor. It was intended to disparage the plaintiff, and thereby to reflect adversely upon the mayor who had appointed him to public office. Such an intent, however, is distinguishable from that which is now necessary to support a finding of "actual malice." We are compelled to hold that the statement bears sufficient relationship to the facts to negate the conclusion that its author intended to disseminate information which he knew to be false, or about the truth of which he entertained serious doubts. We are therefore required to reverse the judgment of the appellate court.

Judgment reversed